IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 9509 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SANJAYKUMAR BHAGWANDAS ACHARYA

Versus

THE STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 9509 of 2004

MR JM BUDDHBHATTI for Petitioner No. 1-3

MR AY KOGJE, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 18/10/2004

ORAL JUDGEMENT

1. Heard ld. Sr.Counsel Mr. Maganbhai Barot with ld. Counsel Mr. JM Buddhbhatti for the petitioners and

ld. APP Mr. A.Y. Kogje for respondent State.

2. Having considered the contentions raised in the application preferred under Sec.227/228 of CrPC and considering the order passed by ld. Asstt. Judge, Patan, the Court finds no merit in the present Cri. Misc. Application.

3. The petitioners are facing serious charge of the offence punishable under Sec.302 of Indian Penal Code and it is submitted that the prosecution has suppressed certain material aspect and copy of the dying declaration recorded by the Executive Magistrate on 10.1.2000 at 1.20 A.M. i.e. immediately after the midnight, has not been supplied to the petitioner with the papers of chargesheet. It is argued by ld. Sr.Counsel Mr. Barot that initially no name of the accused assailants were ever disclosed by any of the prosecution witnesses including the injured and father of the injured complainant and improving the entire story, the petitioners have been falsely implicated in a serious crime. It is further argued that in view of scheme of Sec.227/228 of CrPC, it is obligatory on the part of the Court to look into the entire papers of investigation and on facts emerging from record, if the Court is able to reach to the conclusion that without repudiating the allegations made by the prosecution witnesses the accused is found to be innocent or falsely implicated,then the Court shall discharge the accused.

4. The ld. Judge has rightly observed that since the dying declaration recorded by the Executive Magistrate has no status of the dying declaration in the eyes of law because the injured has survived and, therefore, it can be said to be a previous statement of the injured and it will not be either legal or proper to evaluate the evidence at the stage of dealing with an application preferred under Sec.227 of CrPC.

5. Considering in the background of the settled legal position and the pronouncements of the Apex Court as well as High Courts, the accused can take an advantage of any contradiction or improvement if they are there in the papers of investigation. However, that by itself does not entitle the accused persons to get discharge. Undisputedly, the ld. trial Judge has observed that some prosecution witnesses have disclosed the names of the assailants. It is difficult to say that there is no iota of evidence linking the accused with the crime alleged. The things in such cases should be left for appreciation of evidence to the trial Court and accused can positively make use of previous statements made by each prosecution

witness including the injured and statement recorded by the Executive Magistrate.

6. There is some force in the grievance expressed by ld. Sr.Counsel Mr. Barot that the prosecution has not acted fairly in not providing the copy of the dying declaration recorded by the Executive Magistrate. It is true that the prosecution is not supposed to provide copy of all the documents upon which the prosecution does not want to place reliance, but when this material aspect was brought before the trial Court during the course of arguments of application preferred under Sec.227 of CrPC, atleast the ld. trial Judge ought to have directed the prosecution to provide copy of the statement recorded by the Executive Magistrate on 10.1.2000. It appears that there was no such formal prayer in the application and so appropriate orders are not passed, but in exercise of the powers vested with the Court under Section 482 of CrPC, the prosecution can be asked to provide copy of the statement recorded by the Executive Magistrate to the accused so that they can develope their defence, if they so desire during the course of trial. However, there is no scope to remand the matter to the Court of Sessions for hearing the application for discharge afresh in the background of the facts emerging from the statement recorded by the Executive Magistrate.

7. In number of cases of communal disturbance that have taken place in the State of Gujarat, the approach of this Court and the Court of Sessions have remained consistent and on such alleged improvement or contradiction, trial can not be shut down indirectly. in view of above, the findings recorded by ld. trial Judge are found absolutely in accordance with law and, therefore, present Cri. Misc. Application fails and is hereby dismissed in limine.

8. Before parting with the order, the Court would like to direct the prosecution to supply the copy of the statement of the injured recorded by the Executive Magistrate on 10.1.2000 at 1.20 A.M. to the accused persons in the fairness of the trial that may be conducted by the trial Court against the petitioners accused and the petitioners accused are also at liberty to approach this Court if proper compliance is not made by the prosecution. Directions accordingly.

[C.K. BUCH, J]

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